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**BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES**

Application Number: 10/530,290
Filing Date: June 14, 2005
Appellant(s): HASCHEN ET AL.

Robert J. Webster
For Appellant

EXAMINER'S ANSWER

This is in response to the appeal brief filed March 14, 2008 appealing from the Office action mailed April 5, 2007.

(1) Real Party in Interest

A statement identifying by name the real party in interest is contained in the brief.

(2) Related Appeals and Interferences

The examiner is not aware of any related appeals, interferences, or judicial proceedings which will directly affect or be directly affected by or have a bearing on the Board's decision in the pending appeal.

(3) Status of Claims

The statement of the status of claims contained in the brief is correct.

(4) Status of Amendments After Final

The appellant's statement of the status of amendments after final rejection contained in the brief is correct.

(5) Summary of Claimed Subject Matter

The summary of claimed subject matter contained in the brief is correct.

(6) Grounds of Rejection to be Reviewed on Appeal

The appellant's statement of the grounds of rejection to be reviewed on appeal is correct.

(7) Claims Appendix

The copy of the appealed claims contained in the Appendix to the brief is correct.

(8) Evidence Relied Upon

5,824,355

HEITRITTER

10-1998

Schingoethe, "Feed Wet Distillers Grains to Dairy Cattle". Dairy Science Department South Dakota State University (May 24 2001), pp 1-6.

(9) Grounds of Rejection

The following ground(s) of rejection are applicable to the appealed claims:

Claims 87, 89, 90, 96, 106, 108-111, 116, and 119-121 are rejected under 35 U.S.C. 112, second paragraph, as being indefinite for failing to particularly point out and distinctly claim the subject matter which applicant regards as the invention.

Claims 116, and 122 recites the limitation "starting by product solubles nutrient source mixture". There is insufficient antecedent basis for this limitation in the claim. The independent claims from which these claims depend on do not recite the specific mixtures as claimed; the independent claims recite "by-product solubles nutrient source mixture", however it is unclear at which part of the instantly claimed process the "starting" mixture is produced. For example, it is unclear as to if the starting mixture is the wet distillers, brewers or fermenters solubles alone, or as to if the starting mixture is the the unmodified mixture of the wet distillers, brewers or fermenters solubles and one or more crude protein and/or amino acid content nutrient source, or as to if the starting mixture is the the temperature modified mixture of the wet distillers, brewers or fermenters solubles and one or more crude protein and/or amino acid content nutrient source, or as to if the starting material is some other composition.

Claims 87, 89, 90 96, 106, 110, 116, and 122 are rejected under 35 U.S.C. 112, second paragraph, as being incomplete for omitting essential steps. The claims refer to increasing the nutrient values of a source mixture, however, they do not refer to the method by which this is done. Thus, it is unclear in these method claims in which step of the independent claim an increased nutrient value is achieved. For example, it is unclear in claim 87 if the nutrient increase is achieved in step a of claim 84, step b of claim 84, or in some other omitted essential step. Furthermore, it is unclear as to which source mixture is modified, i.e. the nutrient source mixture in step a, step b, or the omitted essential step.

Claims 109-111 and 119-122 are indefinite. The claims recite a system for predictably enhancing nutrient value, a system for determining means, a system for mixing, and a system adjusting means. It is unclear as to what apparatus are associated with the "systems". For example, it is unclear as to what kind of apparatus is necessary for "a system for determining means for determining the desirable levels of crude protein [in the feed composition]...". It is unclear if the system is based on personal observation of the animal for which the feed is to be feed; it is unclear if the system is based on chemical observation of the animal to which the feed is to be feed, ect.

Claims 84-122 are rejected under 35 U.S.C. 103(a) as being unpatentable over Heitritter et al. (US 5824355) in view of Schingoethe (Feed Wet Distillers Grains to Dairy Cattle, May 2001).

Heitritter et al. (Heitritter) teach a method of and system for enhancing the nutrient value of feed or feed supplement for lactating ruminant animals comprising:

- Determining the desirable levels of crude protein, UIP/RUP, amino acids and post ruminal digestibility in an end product;
- Creating a product base composed of an enhanced nutrient source, including corn and/or soybean meal;

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- Adjusting the temperature and/or the moisture content of the base composition to a temperature at least 200F and to a moisture content of about 20-25%, wherein the cooker is operated between 150-220F (i.e. about 208-210F, about 211-220F, about 180-250F, about 218F, and a temperature at which proteins are caused to denature)

Refer specifically to Abstract, Column 1 lines 5-23, Column 2 lines 50-67, Column 3 lines 45-52, Column 4 lines 36-45, and Examples 1 and 2. Specifically regarding the temperate to which the end product is adjusted, in the absence of a definition with the limitations of the term, "about", the heating temperature of the base composition of at least 200F wherein the cooker is operated from 150-220F or at those temperature ranges designed to prevent overcooking and/or burning of the moist meal feed (Column 4 lines 36-45) as taught by Heitritter reads upon appellant's claimed ranges of the base composition at about 208-210F, about 211-220F, about 180-250F, and about 218F. Furthermore, it would have been obvious to one of ordinary skill in the art at the time the invention was made to chose a specific temperature range over 200F which prevented overcooking and/or burning of the moist meal feed while being most efficient for the heating element utilized. Time and temperature were known as inverse variables and were routinely adjusted during cooking by those of ordinary skill in the art depending on factors such as the equipment available for cooking, the composition being cooked, and the properties of that composition, such as burn temperature and thickness.

Heitritter teaches that the final product has the following characteristics:

- Crude protein content of 47.2% (i.e. over about 30%, less then about 54%, and within the range of 30-58%);
- UIP or RUP content of 69.9% of the crude protein (i.e. over 50%, in the range of 63-83%, in the range 50-83%);
- Amino acid levels in the crude protein and in the UIP/RUP of 3.8% lysine (i.e. about 2%) and 12.8% methionine (i.e. about 8%); and
- Post ruminal digestibility of the UIP/RUP of 60.7% (i.e. 60-94%).

- Moisture content between 12-16% (i.e. including within the range of about 0-14%)

Refer specifically to Column 3 lines 9-13, Column 4 lines 49-59, Examples 1-5, and Tables II and III. Specifically regarding the levels of amino acid levels, in the absence of a definition with the limitations of the term, "about", the ranges of amino acids taught by Heitritter of 3.8% lysine and 12.8% methionine read upon appellant's claimed ranges of about 2% lysine and about 8% methionine. Furthermore, it would have been obvious to vary the amino acid levels of lysine and methionine in the feed composition depending on the particular cattle to which the feed was produced, i.e. feed for a lactating cattle would have different requirements than feed for a meat cattle.

Heitritter, however, is silent to feed composition composed of a base that includes wet end distillers, brewers or fermenters byproducts as recited in claims 84, 103, 105, 109, 112, 114, 115, and 119-121, to a specific amount of the wet end corn distillers grains and high protein soybean meal as recited in claim 91, to an empirical formula relating UIP to end product temperature which describes the method of enhancing the feed composition, specifically $UIP(\% \text{ of CP}) = (\text{End Product Temperature } F \times 0.819) - 107.644$ as recited in claims 84, 103, 105, 109, 112, 114, 115, and 119-121, to the increased percentage of nutrient values in relation to the by product nutrient source mixture as recited in claims 87, 89, 90, 96, 106, 110, 116, and 122, and to the UIP pepsin digestibility of the final product as recited in claims 94 and 95.

Schingoethe teaches that the inclusion of wet end fermenters grain, in feed for lactating cattle, has been known for several years. Schingoethe teaches that corn distiller's grain is a good quality protein source. Schingoethe teaches animal performance is better when cattle are feed wet corn distiller's grain as opposed to dry corn distiller's grain. Schingoethe teaches that corn gluten meal (a form of corn meal) is a very good protein supplement, but is best when fed in combination with other protein supplements. Refer specifically to Page 1 paragraph 1, page 3 paragraph 3, page 4 paragraph 1, and Page 5 paragraph 3.

Regarding the feed composition composed of a base that includes wet end distillers, brewers or fermenters byproducts and the specific amount of the wet end corn distillers grains and high protein soybean meal in the composition, it would have been obvious to one of ordinary skill in the art at the time the invention was made to include wet end corn fermenter's grain with the corn and/or high protein soybean meal in the feed composition for lactating cattle as taught by Heitritter in view of Schingoethe. One of ordinary skill in the art at the time the invention was made would have been motivated to include a combination of wet end corn fermenter's grain and high protein soybean/corn meal as the composition of the feed material as taught by Heitritter in view of Schingoethe in order to produce an optimal feed composition for animals, such as lactating cattle. One would have been further motivated to chose a specific ratio of wet end corn distiller's grain to high protein soybean and/or corn meal depending of the specific concentration of protein desired in the feed composition before treatment, as the starting materials were known to contain different amounts of protein.

Regarding an empirical formula relating UIP to end product temperature as describing the method of enhancing the feed composition, specifically the empirical formula $UIP(\% \text{ of CP}) = (\text{End Product Temperature } F \times 0.819) - 107.644$, Hietritter teaches of a feed with a specific RUP/IUP level of 69.9% and coordinating end product temperatures of at least 200F, to alternatively explain the method of increasing the nutrient value of a feed as taught by appellant. It is noted that processes which are the same can be explained through different means, i.e. gravity can be explained through the process of a pencil drooping or through a mathematical equation. Although, different words and images are utilized to describe the processes, the processes themselves are not different, but the same. Since the appellant and the reference both teach of substantially the same process, i.e. heating a feed composition to a temperature of at least 200F, with substantially the same product produced, i.e. a feed composition with a crude protein content of 47.2%, UIP/RUP content of 69.9% of the crude protein, amino acid levels of 3.8% lysine and 12.8% methionine, post ruminal digestibility of the UIP/RUP of 60.7%, and a moisture content between 12-16%, thus

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one of ordinary skill in the art would expect that the references of record teach of the instantly claimed method, absent any clear and convincing arguments to the contrary.

Regarding an increased percentage of nutrient values in relation to the by product nutrient source mixture as recited in claims 87, 89, 90, 96, 106, 110, 116, and 122, it is noted that as stated above, it is unclear as to which nutrient source mixture is modified in claims 87, 89, 90, 96, 106, 110, 116, and 122. Heitritter in view of Schingoethe teach of a similar base nutrient composition and an end product with similar nutrient values as appellant. Heitritter also teaches of a similar method (i.e. heating) of increasing the nutrient value in the base composition. Thus, as the references teach of a similar start composition, a similar method of treatment to the start composition, and a final product with similar nutrient values, one of ordinary skill in the art at the time the invention was made would expect the same percentage increase in the nutrient values of the start composition to the final composition, as instantly claimed. Furthermore, it would have been obvious to one of ordinary skill in the art at the time the invention was made to retreat the product with the method as taught by Heitritter to produce a feed with an even greater increased nutrient value if it was desired to feed the animal a smaller amount of feed and obtain the same positive results from the feed (i.e. the concentration of nutrients within the feed would need to be greater if a smaller amount of feed was to be fed to the animal and yield the same positive results) and depending on the specific animal being feed and the stage at which the animal's life was at (i.e. adolescence, adulthood, pregnancy, milk production, ect) and the amount of nutritional ingredients required by that animal.

Regarding the UIP pepsin digestibility of the final product, Heitritter in view of Schingoethe teach of a similar base nutrient composition and an end product with the same nutrient values as appellant. Heitritter also teaches of the same method (i.e. heating) of increasing the nutrient value in the base composition. Thus, as the references teach of a similar start composition, the same method of treatment to the start composition, and a final product with similar nutrient values, one of ordinary skill in the art at the time the invention was made would expect the same percentage increase

in the nutrient values of the start composition to the final composition, as instantly claimed. Furthermore, it would have been obvious to one of ordinary skill in the art, at the time the invention was made to modify the a feed as taught by Heitritter to a specified value of pepsin digestibility depending on the specific animal being feed and the stage at which the animal's life was at (i.e. adolescence, adulthood, pregnancy, milk production, ect).

Response to Arguments

Appellant's arguments filed March 14, 2008 with respect to the 112 2nd Paragraph Rejections have been fully considered but they are not persuasive.

Appellant's argument, Brief page 24, regarding the limitation "starting by product solubles nutrient source mixture", as recited in claims 116 and 122 consists of a recitation of the claim language and a statement that the claim is clear. Appellant's argument is not convincing as appellant has not demonstrated in the claims or in the arguments that the claim language is clear. As stated above, it is unclear to one of skill in the art as to what the starting mixture consists of; it is unclear as to if the starting mixture is the wet distillers, brewers or fermenters solubles alone, or as to if the starting mixture is the the unmodified mixture of the wet distillers, brewers or fermenters solubles and one or more crude protein and/or amino acid content nutrient source, or as to if the starting mixture is the the temperature modified mixture of the wet distillers, brewers or fermenters solubles and one or more crude protein and/or amino acid content nutrient source, or as to if the starting material is some other composition.

Appellant's argument, Brief pages 25-27, regarding omitted essential method steps in claims 87, 89, 90 96, 106, 110, 116, and 122 are not convincing. Appellant's argument consists of case law and a statement that it is unclear as to where there is an omitted essential element. Specifically regarding appellant's recited case law, appellant is reminded that the applications are not the same, do not provide the same fact situation or disclosure, and every application is examined based upon its individual characteristics; therefore case law from other applications are not identical to the situation of present. Given this, and in light of appellant's lack of tangible argument to

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the instant situation, the recitation of case law is not persuasive in arguing the clarity of the claim language. Specifically regarding appellant's argument that it is unclear as to where the omitted essential element is, as stated above, the claims refer to increasing the nutrient values of a source mixture, however, they do not refer to the method by which this is done. Thus, it is unclear in these method claims in which step of the independent claim an increased nutrient value is achieved. For example, it is unclear in claim 87 if the nutrient increase is achieved in step a of claim 84, step b of claim 84, or in some other omitted essential step.

Appellant states, Brief pages 27-28, "It is improper for an Examiner to tell the appellant how to claim what the Applicant regards as his invention as long as the metes and bounds of the invention are clear and definite." As stated in previous rejections and in the rejection above, the metes and bounds of the invention are unclear and indefinite and thus the 112 rejections of record remain and are proper.

Appellant's argument, Brief pages 28-31, regarding a system for predictably enhancing nutrient value, a system for determining means, a system for mixing, and a system adjusting means as recited in claims 109-111 and 119-122 is not convincing. Appellant argues that the claimed systems are clear and would be determinable to one of ordinary skill in the art based on Applicant's disclosure. Applicant's argument consists of a statement that it is not understood why the rejection is based on the second paragraph of 35 USC 112, a statement that the terminology of the claimed language is clear to one of ordinary skill in the art based on Applicant's disclosure, case law, and an argument that the examiner improperly made the rejection as the factors of *In re Wands* have not been addressed. Specifically regarding Applicant's statement that it is not understood why the rejection is based on the second paragraph of 35 USC 112, Applicant's statement that the terminology of the claimed language is clear to one of ordinary skill in the art based upon Applicant's disclosure, and an argument that the examiner improperly made the rejection as the factors of *In re Wands* have not been addressed, as stated in the previous rejections and the rejection above, the metes and bounds of the rejected claims are unclear as it is unclear as to what type of apparatus, if any is associated with the "system". It is noted that the rejection is not an enablement 112

1st paragraph rejection, as addressed in *In re Wands*; the question at hand, in the 112 2nd paragraph rejection is not whether one of skill in the art would be enabled to practice the invention, but rather if the metes and bounds of the claim language are clear and indefinite. Specifically regarding appellant's recited case law, appellant is reminded that the applications are not the same, do not provide the same fact situation or disclosure, and every application is examined based upon its individual characteristics; therefore case law from other applications are not identical to the situation of present. Given this, and in light of appellant's lack of tangible argument to the instant situation, the recitation of case law is not persuasive in arguing the clarity of the claim language.

Appellant's arguments filed March 14, 2008 with respect to the 103 rejection have been fully considered but they are not persuasive.

Appellant argues that Hietritter does not teach of a method of predictably enhancing feed products (Brief pages 32-37). Appellant states that Heitritter does not predetermine the nutrient levels that the end product will contain. Appellant's argument is not convincing. It is noted that "predictably" is defined as to known in advance or to foretell on the basis of observation, experience, or scientific reason. As Heitritter shows a similar process to that as instantly claimed by appellant, including forming a nutrient source mixture and treating that mixture with heating, Heitritter has also shown a method by which a prediction of enhancing the nutrient can be achieved. By practicing the reference of the invention, and setting forth the data obtained, based on scientific reasoning, an equation and thus a system of predictably achieving a nutrient level in an end product is arrived at.

Appellant argues that Hietritter does not teach of an empirically derived formula used to achieve predetermined nutrient levels. It is noted that "predictably" is defined as to known in advance or to foretell on the basis of observation, experience, or scientific reason. As Heitritter shows a similar process to that as instantly claimed by appellant, including forming a nutrient source mixture and treating that mixture with heating, Heitritter has also shown a method by which a prediction of enhancing the nutrient can be achieved. By practicing the reference of the invention, and setting forth the data

obtained, based on scientific reasoning, such an equation can be arrived at for predicting nutrient levels in an end product: $UIP(\% \text{ of CP}) = (\text{End Product Temperature } F \times 0.819) - 107.644$.

Appellant argues that Heitritter only provided limited data (Brief Pages 36 and 37). As stated above, Heitritter shows a similar process to that as instantly claimed by appellant, including forming a nutrient source mixture and treating that mixture with heating, Heitritter has also shown a method by which a prediction of enhancing the nutrient can be achieved. By practicing the reference of the invention, and setting forth the data obtained, based on scientific reasoning, such an equation can be arrived at for predicting nutrient levels in an end product: $UIP(\% \text{ of CP}) = (\text{End Product Temperature } F \times 0.819) - 107.644$. Appellant's argument is not convincing. Appellant appears to have used more reference points by using more temperature and moisture parameters to extrapolate the relationship that has been implicitly shown to exist in Heitritter and then using statistical analysis, has calculated an empirical formula such as that shown, i.e. $UIP(\% \text{ of CP}) = (\text{End Product Temperature } F \times 0.819) - 107.644$.

In response to appellant's argument that there is no suggestion to combine the references to arrive at a method that combines wet end corn distillers grain and soybean meal and that the references teach away from the present invention, the examiner recognizes that obviousness can only be established by combining or modifying the teachings of the prior art to produce the claimed invention where there is some teaching, suggestion, or motivation to do so found either in the references themselves or in the knowledge generally available to one of ordinary skill in the art. See *In re Fine*, 837 F.2d 1071, 5 USPQ2d 1596 (Fed. Cir. 1988) and *In re Jones*, 958 F.2d 347, 21 USPQ2d 1941 (Fed. Cir. 1992). In this case, appellant argues that there is no motivation to alter the start feed composition as taught by Heitritter, as the starting composition requires oil and corn is not high in oil. Heitritter teaches of a protein enhanced ruminant feed for lactating animals, which includes soybean and/or corn meal (Column 8 lines 48-55). Schingoethe teaches that the inclusion of wet end fermenter's grain, in feed for lactating cattle, has been known for several years. Schingoethe teaches that corn distiller's grain is a good quality protein source. Schingoethe teaches

animal performance is better when cattle are feed wet corn distiller's grain as opposed to dry corn distiller's grain. Schingoethe teaches that corn gluten meal (a form of corn meal) is a very good protein supplement, but is best when fed in combination with other protein supplements. Refer specifically to Page 1 paragraph 1, page 3 paragraph 3, page 4 paragraph 1, and Page 5 paragraph 3. Thus, one would have been motivated to include wet end corn fermenter's grain in the corn and/or soybean meal as taught in the composition of Heitritter because of the benefits of wet end fermenters grain as taught by Schingoethe. Furthermore, it is noted that Heitritter teaches of a base composition with soybean and/or corn meal. The fact that Heitritter teaches of a preferred start material with oils that is not soybean and/or cornmeal is not a teaching away from the use wet end corn distiller's grain as a base composition.

Appellant's arguments are centered around the idea that Heitritter teaches of a different method than that as instantly claimed, the differences that have been specifically argued by appellant are addressed above. Furthermore, the similarities between the instantly claimed invention and the Heitritter are outlined below:

Heitritter teach a method of and system for predictably enhancing the nutrient value of feed or feed supplement for lactating ruminant animals comprising:

- Determining the desirable levels of crude protein, UIP/RUP, amino acids and post ruminal digestibility in an end product;
- Creating a product base composed of an enhanced nutrient source, including corn and/or soybean meal;
- Adjusting the temperature and/or the moisture content of the base composition to a temperature at least 200F and to a moisture content of about 20-25%, wherein the cooker is operated between 150-220F

Appellant claims a method of and system for predictably enhancing the nutrient value of distillers, brewers, or fermenters grain byproducts, i.e. feed or feed supplement comprising:

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- Determining the desirable levels of crude protein, UIP/RUP, amino acids and post ruminal digestibility in an end product;
- Creating a product base composed of distillers, brewers, or fermenters grain byproducts and an enhanced nutrient source, including corn and/or soybean meal;
- Adjusting the temperature and/or the moisture content of the base composition to a temperature of about 208-210F and about 211-220F and about 180-250F and about 218F and a temperature at which proteins are caused to denature

Thus as stated above, the steps in the method as taught by Heitritter is substantially the same as the method as instantly claimed.

Heitritter teaches that the final product has the following characteristics:

- Crude protein content of 47.2% (i.e. over about 30%, less than about 54%, and within the range of 30-58%);
- UIP or RUP content of 69.9% of the crude protein (i.e. over 50%, in the range of 63-83%, in the range 50-83%);
- Amino acid levels in the crude protein and in the UIP/RUP of 3.8% lysine (i.e. about 2%) and 12.8% methionine (i.e. about 8%); and
- Post ruminal digestibility of the UIP/RUP of 60.7% (i.e. 60-94%).
- Moisture content between 12-16% (i.e. including within the range of about 0-14%)

Appellant argues that there is no evidence to increase the amount of RUP depending on the final product desired (Brief page 43). Examiner recognizes that obviousness can only be established by combining or modifying the teachings of the prior art to produce the claimed invention where there is some teaching, suggestion, or motivation to do so found either in the references themselves or in the knowledge generally available to one of ordinary skill in the art. In the instant case...

Appellant argues that the limitation of UIP as a percentage of the crude protein as recited in claims 86, 96, 106, 110, 116, and 112, has only been addressed in the 112 rejections (Brief Page 43). Appellant is referred to the rejection above and page 6 lines 1-2 of the non-final office action mailed 11/14/06 and the final office action mailed 4/5/07 in which the non-final rejection was incorporated by reference. Additionally, appellant is referred to Heitritter, Table II, in which Heitritter teaches of UIP or RUP content of 69.9% of the crude protein which reads upon the claimed ranges of 50-83%. Additionally it is noted that claim 86 is directed to the amino acid content of the feed and not the UIP level of the feed.

Appellant states that the office states it is not equipped to manufacture products and thus the burden has been shifted to Appellant to show that the products are different (Brief pages 43 and 44). It is unclear as to where the office has made this statement in relation to the present rejections.

(11) Related Proceeding(s) Appendix

No decision rendered by a court or the Board is identified by the examiner in the Related Appeals and Interferences section of this examiner's answer.

For the above reasons, it is believed that the rejections should be sustained.

Respectfully submitted,

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